



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OKWENGU, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 54 OF 2015

BETWEEN

ANNAH MWIHAKI WAIRURU.....APPLICANT

AND

HANNAH WANJA WAIRURU.....RESPONDENT

(Application for extension of time for giving Notice of Appeal, and for leave to appeal out of time from the decision of the High Court of Kenya (Kimaru, J.), dated 26th June 2014

in

Succession Cause No. 2800 of 2001)

R U L I N G

[1] The facts leading to this application are undisputed. **Annah Mwihaki Waruiru** who is the applicant before us was appointed the administrator of the estate of the late **Patrick Waruiru Mukui** (deceased), who died intestate on 25th June, 2000. The grant was issued on 10th June, 2009 and confirmed on 22nd September, 2010 with the property of the deceased devolving to the applicant and her 3 daughters who were the only persons named as beneficiaries.

[2] Subsequently, **Hannah Wanja Waruiru** who is now the respondent before us applied to the High Court for revocation of the grant, on the ground that the grant was obtained by concealment of material facts which was the fact that the respondent was a wife to the deceased and therefore entitled to a share in the estate of the deceased.

[3] In a ruling delivered on 26th June, 2014, the High Court (Kimaru, J.), found that the respondent was a wife to the deceased and a dependant of the deceased under **Section 29(a)** of the Law of Succession Act, and that this fact was indeed concealed from the court when the grant was issued to the applicant and confirmed. The learned judge therefore revoked the grant and certificate of confirmation and directed that a new grant be issued in the joint names of the applicant and the respondent. It is this ruling that the applicant is aggrieved with and intends to appeal against.

[4] In her affidavit sworn in support of the motion, the applicant explains that she was not able to file the notice of appeal within the required time as she was not aware of the ruling revoking the grant issued to

her, as her previous advocates Burugu & Company Advocates did not inform her of the ruling, and that she only got to know of the ruling almost a year later on 4th February, 2015 when her current advocate (Otieno Ochich), informed her of the ruling.

[5] The applicant believes that she has a meritorious appeal, and has filed a draft memorandum of appeal in which 20 grounds have been set out. The applicant has filed written submissions in which she urges the court not to penalize her for the fault of her former advocate. She argues that it is in the interest of justice that she be given an opportunity to pursue her intended appeal so that substantive justice is achieved; and that the respondent will not suffer any prejudice if the orders are given as it is in the interest of all parties that justice is done.

[6] In her replying affidavit sworn in response to the motion, the respondent maintains that the application is frivolous, vexatious, misconceived and an abuse of the court process; that the applicant was personally present in court together with her former advocate when the ruling of 26th June, 2014 was delivered and she cannot therefore shift blame to her former advocate; that the order that the grant be issued to the applicant and the respondent as joint administrators was fair as each house is represented; and that the intended appeal would only delay the resolution and distribution of the estate.

[7] In her written submissions, the respondent has urged that even if the Court is to accept that the applicant's counsel failed to inform her of the ruling, the applicant has the remedy of seeking compensation from her former advocates for the negligence. In her view, that was the better option considering the delay that would be caused by the intended appeal.

[8] Further, the respondent contends that the intended appeal is not arguable and has little chance of success; that the applicant should not be allowed to abuse the principle of fair hearing; and that it is imperative that the litigation is brought to an end so that the true beneficiary of the deceased's estate get their rightful share. The Court was therefore urged to dismiss the motion.

[9] This Court has been called upon to exercise its discretion as a single Judge to extend time for filing a notice of appeal and also grant leave to appeal out of time. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi**, (Civil Application No. Nai. 255 of 1997) (unreported); this Court stated thus regarding how such discretion is to be exercised.

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

[10] As was stated by Waki, JA in **Njuguna v Magichu & 73 others** 2003 KLR 507:

“The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on sound factual and legal basis.”

[11] The above are the principles that I bear in mind in determining this application. In this case, the judgment was delivered on 26th June 2014, and the Notice of Appeal filed on 11th February 2015. Therefore, the notice was filed after 221 days, which was contrary to **Rule 75** of the Court Rules that requires such a notice to be filed within 14 days. That is to say that there has been a delay of 207 days.

[12] The applicant has blamed her advocate for failing to inform her of the ruling that she intends to appeal against. The respondent dismisses the excuse advanced by the appellant, maintaining that both the applicant and her counsel were present in court on the day the judgment was delivered. However, there is no record that was availed to the Court to confirm that contention.

[13] Be that as it may, in the affidavit sworn in support of the certificate of urgency by the applicant's current advocate, a summon for confirmation of the grant that was filed by the respondent's counsel on 6th October, 2014 is annexed. There is also a letter dated 20th November 2014 from the respondent's advocate addressed to the applicant's former advocate. These documents confirm that the respondent not only brought the ruling of 26th June, 2014 to the advocate's attention but also moved the Court with a view to enforcing the order that was made in the ruling.

[14] Much as the applicant has attempted to shift the blame to her counsel, nothing has been exhibited to confirm that indeed the former advocate failed to advise her of the ruling, or that there was any correspondence or any action taken by the applicant in regard to this serious omission. Nor has any explanation been given as to why the advocate withheld the information from the applicant.

[15] What the applicant is presenting appears to me to be not just a case of an inadvertent omission or innocent mistake by her counsel, but a serious case of negligence as the advocate not only ought to have advised the applicant of the ruling but also ought to have taken action to respond to the application filed by the respondent of which he had indeed been served. This is the kind of mistake that this court cannot condone. An advocate is an officer of the court who is expected to be upright and dependable. Where as is alleged herein the advocate has conducted himself in a manner that is not consistent with what is expected from an officer of the court, this Court cannot cover up such misconduct by treating it lightly.

[16] Besides, the applicant was aware of the application for revocation of the grant as she participated in the hearing. There is no explanation as to what the applicant did to know the fate of the application. The 207 days delay was inordinate and inexcusable.

[17] Further, I appreciate that the matter concerns the personal status of the parties. In particular, whether the respondent is a dependant who should be provided for in the estate of the deceased. However, the issues raised by the applicant in the intended appeal can still be canvassed during the distribution of the estate and confirmation of the grant. I find that the circumstances of this matter are such that any further delay is quite prejudicial to the respondent, as she cannot have access to her share of the estate until this matter is resolved.

[18] For these reasons I decline to exercise my discretion in the applicant's favour and dismiss the applicant's motion dated 6th February, 2015. Each party shall bear their own costs.

Dated and delivered at Nairobi this 19th day of October, 2017.

H. M. OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR